Appendix A

Opinion and Decision of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 489—September Term, 1963.

(Argued June 3, 1964 Decided June 19, 1964.)

Docket No. 28890

JOHN PAPALIA,

Petitioner-Appellant,

—*v.*—

UNITED STATES OF AMERICA,

Appellee.

Before:

MOORE, KAUFMAN and HAYS,

Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, denying petitioner's motion to withdraw a guilty plea, Fed. R. Crim. P. 32(d), or in the alternative to vacate the sentence, 28 U. S. C. §2255 (1958).

Judgment affirmed.

Appendix A

ARTHUR ADDESS of BOBICK & DEUTSCH, New York City, *for Petitioner-Appellant.*

MICHAEL W. MITCHELL, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, and Bernard W. Nussbaum, Assistant United States Attorney, on the brief), *for Appellee.*

PER CURIAM:

Eleven months after sentencing, petitioner, John Papalia, moved to withdraw his plea of guilty, Fed. R. Crim. P. 32(d), or in the alternative to vacate the sentence, 28 U. S. C. §2255 (1958), on the ground that at the time of the plea and sentencing he "was mentally incompetent to either plead or be sentenced." After hearing the testimony of Papalia and his supporting witnesses, the district judge summarily granted the government's motion to dismiss with the terse comment, "The case is a tissue of lies from A to Z." On this appeal Papalia claims (1) that the district judge erred in failing to make specific findings of fact and conclusions of law and (2) that, on the evidence presented at the hearing, he was entitled to relief.

Although Papalia made no request below for formal findings of fact and conclusions of law, he contends here that the failure to make such findings violated 28 U. S. C. §2255 (1958) which provides:

> "Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the court shall cause notice thereof to be

served upon the United States attorney, grant a prompt hearing thereon, determine the issues *and make findings of fact and conclusions of law with respect thereto* * * *" (Emphasis added.)

But the district judge's comment clearly indicated the court's essential findings that Papalia's story was unworthy of belief and that Papalia was mentally competent at the time of his plea and sentencing. Although fuller findings might have been helpful, we cannot say that Papalia has been prejudiced by their absence. See *Rossiter* v. *Vogel*, 148 F. 2d 292, 298 (2d Cir. 1945); *Huard-Steinheiser, Inc.* v. *Henry*, 280 F. 2d 79, 84 (6th Cir. 1960); 5 Moore, Federal Practice ¶52.06[2] (2d ed. 1951).

Papalia's contention that on the evidence presented at the hearing he was entitled to withdraw his guilty plea is only a disagreement with the district judge's conclusion. We have examined the evidence and hold that the district judge's conclusion is not clearly erroneous. Papalia did not sustain his burden of proving that he was not mentally competent when he entered his guilty plea and was sentenced. See *Holmes* v. *United States*, 323 F. 2d 430 (7th Cir. 1963), cert. denied, 376 U. S. 933 (1964); *United States* v. *Harris*, 211 F. Supp. 771 (S. D. Fla. 1962), aff'd 316 F. 2d 229 (5th Cir. 1963).

Affirmed.

Appendix B

Decision by MacMahon, D. J.

(116)

Mr. Bobick: The petitioner rests, your Honor.

Mr. Gold: At this time, your Honor, the government moves to dismiss the motion on the ground that the burden of proof has not been met.

The Court: Granted as to both motions. The case is a tissue of lies from A to Z.

Mr. Bobick: Your Honor, is that comment on the record?

The Court: Yes.

Appendix C

Statute Involved

Title 28, United States Code

§2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Appendix D

Rule Involved

Federal Rules of Criminal Procedure

Rule 32(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.